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Brian Edward Brooker

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EXAMINER

BEKKER, KELLY JO

ART UNIT

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1794

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DELIVERY MODE

09/21/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

DETAILED ACTION

Applicant's amendments made June 5, 2009 have been entered.
Claims 23-41 are pending.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 second paragraph rejection of claim 38, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention for the recitation, "highly surface active water soluble emulsifier" has been withdrawn in light of applicant's amendments made June 5, 2009.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 23-33, 37, and 39-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delany (EP 0147483) in view of Brooker (US 2001/0038872 A1). The references and rejection are incorporated herein and as cited in the office action mailed December 9, 2008.

Claims 34-36 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delany (EP 0147483) in view of Brooker (US 2001/0038872 A1), further in view of Jonas (US 4012533). The references and rejection are incorporated herein and as cited in the office action mailed December 9, 2008.

Response to Arguments

Applicant's arguments filed June 5, 2009 have been fully considered but they are not persuasive.

Applicant argues that Delany teaches of homogenization and aging in the ice cream forming method, which are excluded from the instant claims and that there is no suggestion to remove such processing steps and to do so would destroy the reference and would be hindsight reconstruction. Applicant's argument is not convincing as:

- It must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).
- The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).
- In the instant case, motivation is found in some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art and does not include knowledge gleaned only from the applicant's disclosure.
 - Delany teaches:
 - It is desirable for small fat crystals to be formed in the ice cream because they retain the product when the product is exposed to room temperature, thus obtaining products with less iciness, a smoother texture, better overrun better exposed to heat shock, and which has improved shelf life stability (page 7 lines 15-34, page 13 lines 12-22, and page 2 lines 14-24);
 - The ice cream mixture is homogenized to reduce the size of the fat globules (page 9 lines 30-32);

Art Unit: 1794

- The ice cream mixture is aged for 2-12 hours to form crystallization of the fat (page 13 lines 12-22); and
- The fat emulsion diameter is 1.8-21 microns (page 10 all).
- Brooker teaches:
 - A method of forming food products which includes incorporating hydrogenated fat in the foods which has been cryogenically frozen to provide small crystals of liquid fat (paragraphs 0010, 0011, 0018,0031, and 0032);
 - The food produced has a minimum crystal size, including a crystal size ideally less than 0.1 micron and that the final product with the fat crystals has an improved uniformity (paragraphs 0007, 0016, 0017, and 0022); and
 - The method saves time as no additional time is needed for crystallization to continue over an extended period of time, i.e. aging, (paragraphs 0008, 0020, and 0021).
 - It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the precrystallized particles of fat, which were precrystallized cryogenically in the ice cream taught by Delany in view of Brooker. One would have been motivated to do so because Delany teaches that it is desirable to have small crystallized particles of fat in the ice cream and because Brooker teaches of a method of forming a precrystallized fat with minimal crystallize size that adds improved uniformity in a final product and because the method of Brooker eliminates the need for aging or homogenization to form the reduced size fat crystals, thus saving money on processing time and equipment.

- Regarding the dispersion as gasified and frozen without being subject to homogenization, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the dispersion to be gasified and frozen without being subject to homogenization because:
 - Delany teaches that homogenization is used to form small fat globules of about 1.8-21 microns;
 - Delany teaches that smaller crystals form a better product because they retain when the product is exposed to room temperatures;
 - Brooker teaches that precrystalized particles of fat are formed without homogenization at a size of 0.1 microns
 - It would be common sense to one of ordinary skill in the art that if a processing step could be removed and substantially the same or an improved product could be formed to remove the step would save money on processing time and equipment.
- By using the small precrystalized fat particles as taught by Brooker in the ice cream as taught by Delany, the need for homogenization, i.e. for forming small globules of fat, is removed, thus eliminating a processing step and saving on processing time or equipment. The

exclusion of homogenization in the product processing of Delany in view of Brooker would not be destroying of the reference as the function of homogenization, i.e. forming reduced size fat globules, is still accomplished by the method of Brooker.

- By using the precrystallized fat particles as taught by Brooker in the ice cream as taught by Delany, the need for aging, i.e. for forming crystallized globules of fat, is removed, thus eliminating a processing step and saving on processing time or equipment. The product processing of Delany in view of Brooker would not be destroying of the reference as the function of aging, i.e. forming crystallized fat globules, is still accomplished by the method of Brooker.

Applicant argues that there is no motivation to precrystallize the fat prior to blending with the other ice cream ingredients. Applicant's arguments are not convincing. As stated in the previous office action, it would have been obvious one of ordinary skill in the art at the time the invention was made to precrystallize the fat prior to blending it with the other ingredients, if the equipment to precrystallize the fat was contained in a different location from the other ice cream ingredients and the other ice cream processing equipment and it would have been obvious to one of ordinary skill in the art at the time the invention was made to mix and pre-homogenize the other ingredients since the precrystallized fat is able to form a homogenize product without being homogenized, as taught by Brooker. Furthermore, to switch the order of performing process steps, i.e. the order of the addition of the ingredients into the final mixture, would be obvious absent any clear and convincing evidence and/or arguments to the contrary (MPEP 2144.04 [R-1]). "Selection of any order of performing process

steps is prima facie obvious in the absence of new or unexpected results". At the present time, applicant has not provided evidence of new or unexpected results due to the order of the processing steps.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Application/Control Number: 10/525,189

Page 8

Art Unit: 1794

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